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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF, *AMICUS CURIAE.*

The questions involved in this case are of high importance. The observations submitted by this brief relate solely to the question of the devolution of the lands in controversy.

First Proposition.

The lands allotted and with which we are concerned in this case were allotted and conveyed by the United States and the Creek Nation directly to "the heirs of Andrew J. Berryhill, deceased," and such heirs acquired title to said lands by purchase and not by descent.

The provisions of Sections 6 and 7 of the Act of Congress of June 30, 1902 (32 Stat. L. 500), known as the Supplemental Creek Treaty, as are follows:

> "*Sec. 6.* The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to noncitizen heirs in the order named in said chapter 49."
>
> "*Sec. 7.* All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1,

1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Andrew J. Berryhill was born on the 6th of May, 1901, and died in November, 1901. In October, 1902, George Franklin Berryhill, the father, procured the name of his deceased son to be placed upon the approved Creek roll, and in April, 1904, filed on the land in controversy. In October, 1904, three years after the death of Andrew J. Berryhill, a deed was executed containing the provisions that "whereas there has been allotted to the heirs of Andrew J. Berryhill, a deceased Creek Indian," etc., there is hereby "granted and conveyed unto the heirs of Andrew J. Berryhill, a deceased Creek Indian," the lands in controversy.

Andrew J. Berryhill was enrolled as a member of the Creek tribe by virtue of the terms of Section 7 *supra,* and the distribution of the lands involved herein was made in accordance with the same section.

It will be observed that at no time during his life time was Andrew J. Berryhill entitled to enrollment as a citizen of the Creek Nation, and at no time

did he ever have the least vested right, title or interest in or to any of the land of the Creek Nation.

The enrollment of Andrew J. Berryhill was made under an Act of Congress that was passed after his death, and the same is true concerning the allotment of lands, and it is respectfully submitted that under the deed or patent to the heirs in this case the heir as allottee takes his title by purchase directly from the United States and the Creek Nation.

A quite complete analogy is found in the decisions of the state and federal courts interpreting the homestead laws of the United States. In *Towner* v. *Rodegeb,* 74 Pac. 50, the Supreme Court of Washington held that the heirs of an entryman did not acquire their rights from their ancestors by succession, but because the law gave them preference as new homesteaders. See also,

Gould v. *Tucker* (S. D.) 100 N. W. 427, 105 N. W. 624;
McCune v. *Essig,* 122 Fed. 588.

So in the instant case the heirs acquired the estate not by succession but in their own right as allottees, the right being given them by statute subsequent to the death of the ancestor, and the land in the hands of the heirs comes directly from the United States and the Creek Nation.

In the case of *Warnell* v. *Finch,* 15 Tex. 163, the Supreme Court of Texas considered a question al-

most, if not, identical with the one under consideration here, to-wit, an Act of the Republic of Texas entitled "An Act for the Relief of the Heirs of Those Who Fell with Fanning, Ward, Grant and Johnson, during the War with Mexico in the Years 1835 and 1836." The patent to the land in question was issued in 1841 to the "heirs of Henry Warnell." The laws in force in Texas at the time the title passed contained an inhibition against alien heirs holding real estate coming by descent, and Henry Warnell left surviving him one heir, and that heir was an alien. The court in its opinion said:

> "How then does the heir hold in the case before us? Not through his ancestor, but he is the immediate grantee of the Government. His ancestor had no right or title to descend to him. The Government grants the land to the alien heir directly."

So we submit in the case at bar that the deceased, Andrew J. Berryhill, having at no time any right or title to descend, his heir takes directly from the United States and the Creek Nation as an allottee.

There are two modes of acquiring title to real estate, namely, by descent and by purchase. The only necessary requisite of title by descent is that the ancestor must be seized of the estate at the time of his death.

> "We must also remember that no person can be properly such an ancestor as that an in-

heritance of lands or tenements can be derived unless he hath had actual seizin of such land, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freeholder; or unless he hath had what is equivalent to corporeal seizin in hereditaments that are not incorporeal * * * but he shall not be accounted an ancestor who hath had only a bare right or title to enter or be otherwise seized. And therefore all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is not claimed) was the last person actually seized thereof."

—II Blackstone Com., p. 209.

And again, purchase is thus defined by Littleton:

"The possession of lands and tenements which a man had by his act or agreement and not by any of his ancestors or kindred. In this sense it is contra-distinguished from acquisition by right of blood and includes every other method of coming to an estate but merely by inheritance, wherein a title is vested in a person not by his own act or agreement but by the single operation of law."

—II Blackstone Com., p. 240.

And again, in Washburn on Real Property, Vol. 3, p. 4, the principle is laid down in these words:

"In one thing all writers agree, and that is in conceding that there are two methods only regarded as classes of acquiring a title to land; namely, descent and purchase; purchase including every mode of acquisition known to law ex-

cept that by which an heir on the death of an ancestor becomes substituted in his place as owner by the act of the law."

The language "descend to the heirs," incorporated in section 7, *supra,* cannot be said to disclose an intention on the part of Congress that the title to these lands shall be considered by descent and not by purchase. The word "descend" has a well defined meaning in the common law and in our statute law. The essentials for a title by descent must exist to enable lands to descend, and when the word "descend" is used in a statute where it is not technically applicable, the courts will not shape the statute to fit the word, but will give to the word a non-technical meaning as "to go to," "to go down," "to vest in," "to pass," "to inure."

—*Tate* v. *Townsend,* 16 Miss. 316, 319;
Johnson v. *Norton,* 10 Pa. St. 245;
Borgner v. *Brown,* (Ind.) 33 N. E. 92;
Starr v. *Hamilton,* 22 Fed. Cas. 1107.

If the lands in controversy are to be considered as having come by descent for one purpose, they certainly must be considered as having come by descent for all purposes. Suppose in the present case that Andrew J. Berryhill died leaving certain judgments obtained against him or certain debts provable against his estate. Would it be contended that the lands in controversy in the hands of the heirs or administrator would be subject to sale for the satisfaction of such judgments or the payment of such

debts? Certainly not. Such a contention, however, is fully set at rest by this court in the recent case of *Sizemore* v. *Brady*, 235 U. S. 441, decided on December 21, 1914, wherein the court said:

> "The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible."

See also:

Hayes v. *Barringer*, 168 Fed. 221;
Cook v. *Childs*, (Okla.) 145 Pac. 406.

It cannot be said that even though the heirs in this case acquired title by purchase that Congress did not recognize the distinction between lands coming to "heirs" by descent and lands coming to "heirs" by purchase. This distinction was recognized in section 7, *supra*, and in section 5 of Act of Congress approved April 26, 1906 (34 Stat. L. 137), this latter section being as follows:

> "That all patents or deeds to allottees of any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein *shall inure to and vest in the heirs*, and in case any allottee shall die after restrictions have been removed, his property shall *descend to his heirs* or his lawful assigns as if the patent or deed had issued to the allottee during his life, and all patents hereto-

fore issued where the allottee died before the same became effective shall be given a like effect. * * * "

The effect of this section is to vest in the heirs title to the lands claimed by them, even though patent issued after the date of the death of the Indian himself. It is asserted that Congress and the Creek Nation recognized no distinction between "allottees" and that an "allotment to the heirs" should in all respects be considered the same as an allotment made to an enrolled, living, individual member of the tribe.

Andrew J. Berryhill could not qualify as an allottee because at no time during his lifetime was he entitled to enrollment or allotment, and it was not until about a year after his death that the act was passed authorizing the allotment to be made to his heirs.

The Department of the Interior, being charged in its administration of the Indian Affairs in Oklahoma with the interpretation and enforcement of the various Acts of Congress relating thereto, had occasion in a matter before it on July 13, 1908, to construe this question. The following quotation is from the opinion of the Secretary of the Interior in the above matter, known as the *Malissa Wiley* case, as follows:

> "There cannot be a grant unless there is a grantee and consequently there cannot be a present grant unless there is a present grantee. (See

case of *Hall* v. *Russell,* 101 U. S. 503.) Adhering to this principle, it must be held that persons dying prior to May 25, 1901, who were entitled to enrollment if they were living April 1, 1899, are to be considered as units of allotment and distribution, and the interest such persons would have received had they lived passed by virtue of said acts to others.

"Martha Wiley was living on April 1, 1899. She died long before the Act of March 1, 1901, became effective. Malissa Wiley was her nearest relative and became the qualified grantee, and she took the allotment that would have been the property of Martha Wiley had she lived, *not by virtue of inheritance but by grant from the Creek Nation,* in accordance with the Act of Congress referred to which was ratified by the Creek Council. * * *"

In the case of *Hall* v. *Russell,* 101 U. S. 503, this court had under consideration a similar question to the one involved herein. The suit arose over an Act of Congress known as "The Oregon Donation Act" (9 Stat. L. 496). That act provided for the settlement of lands in Oregon Territory; that a single man could take up 320 acres and a married man 640 acres; that at the end of twelve months' occupation the settler must make proof of settlement, and that the land must be occupied and cultivated for four years, etc., and that when all of the provisions of the act had been complied with, a patent should issue. Section 8 of the act provided:

"That upon the death of any settler before the expiration of four years' continued posses-

> sion, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow where one is left, in equal parts, and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to a patent."

Under this act, in the above paragraph, one Loring, a single man, in 1852 settled on the land in dispute. He lived on the land one year and died, leaving a will whereby he devised his estate to one Hall. On the death of Loring certain parties by the name of Delays, husband and wife, claimed the land as settlers. The heirs of Loring, the devisee, Hall, and the Delays all claimed the land. The patent was finally issued to the heirs of the Delays. The question presented was: Whether the heirs of a settler under the Oregon Donation Act, who died before the expiration of the four years' residence as required, took by descent from the settler or as donees of the United States. In other words, the question presented was: Are the heirs to be considered as having taken by purchase or by descent?

The Circuit Court, in passing on the phrase "shall descend to the heirs at law," said:

> "The word 'descent' as here used, means nothing more than pass or go."
>
> —11 Fed. Cas. 251.

On appeal the Supreme Court of the United States sustained the decision of the Circuit Court,

and held that the heirs did not take title by descent, but as purchasers or donees of the United States. Chief Justice WAITE, in delivering the opinion of the court said (101 U. S. 503, 25 L. ed. 829):

> "For the purpose of the present suit it is enough to show that the occupant got no title himself beyond that of a mere right of possession, until he had completed his four years' continued residence and cultivation. * * * There was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years' residence and cultivation. * * *
>
> "As the law required full four years' residence by the person who claimed the grant, if no provisions had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence, it was provided that the possessory rights of a deceased settler should *go* to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, *but from the United States.* The title, it is true, was granted to them by reason of the possessory rights of their ancestors, but these were rights which they could not transfer, and which passed to them under the statute without any act of his. On his death, his heirs became qualified grantees. Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life, need not be decided. It is enough for this case that when

the ancestor died he had nothing in the lands which he could transmit to them, and that what they afterwards got came from the United States and not from him. All his rights in the land were dependent on his completion of the four years' possession, but in consideration of what he had done, Congress made his heirs the special objects of its bounty, if he died before his own grant had been secured. *We attach no importance to the word 'descend' as used in this section. In section 4 the word selected to convey substantially the same idea was 'entitled.'* The thing done was to give the heirs of a settler the benefit of his rights and to designate them as recipients of the bounty of the government instead of him."

This case, we submit, destroys a contention that the use of the word "descend" in the above quoted act of Congress, approved June 30, 1902, shows an intent that the lands in question are to be considered as if they had come to the heirs by descent.

The Legislature of the Territory of Oregon, subsequent to the passage of the Oregon Donation Act, enacted a law the purpose of which was to make the heirs, in cases similar to the case of *Hall* v. *Russell*, take by descent and not by purchase. This law was, however, declared a nullity by the federal courts as in conflict with the Act of Congress.

—*Hershberger* v. *Blewett*, 55 Fed. 170.

In the case of *McKee* v. *Henry*, 201 Fed. 74, the United States Circuit Court of Appeals for the Eighth Circuit decided the question. Hugh War-

den, a duly enrolled Creek citizen died in November, 1899. Though entitled to an allotment of land no selection was made for him prior to his death. Section 28 of the Original Creek Agreement of March 1, 1901, provided for such a contingency and directed that if such citizen were living on April 1, 1899, and should die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, should descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted to them accordingly. No selection was made for him until November 12, 1902. In the meantime on June 30, 1902, the Creek Supplemental Agreement (32 Stat. L. 500), amended section 28 of the Original Creek Agreement by providing that the descent should be according to chapter 49 of Mansfield's Digest of the Laws of Arkansas, instead of the Creek law of descent. The court was called upon to decide whether the land descended according to the law in force at the date of the death of Hugh Warden or the law in force at the time of the allotment.

The Circuit Court of Appeals held that when Hugh Warden died he was seized of no inheritable estate in the lands of the Creek Nation and that there was no estate to descend until allotment, which descended according to the law of descent then in force. The court said:

"When the allotment was made, for the

> first time the rights of any individual vested, and the title became vested in the one at that time fixed by law, and it makes no difference what previous laws may have provided."

In a recent opinion by this court in *Franklin* v. *Lynch*, 233 U. S. 505, the court had under consideration a deed made by Emmer Sisney, an intermarried member of the Choctaw Tribe of Indians, by which she undertook, on October 16, 1905, before allotment, to convey her "entire interest in any and all lands, exclusive of homestead, which might be finally allotted to her by the Commissioners to the Five Civilized Tribes." Though her deed was made after the Act of April 21, 1904 (33 Stat. L. 189), which removed the restrictions on the alienation of lands of allottees of the class to which she belonged, it was held that she had nothing before allotment that she could sell. The court said:

> "As the tribes could not sell, neither could the individual members, *for they had neither an undivided interest in the tribal lands nor vendible interest in any particular tract.*"

In *Woodbury* v. *United States*, 170 Fed. 302, the Circuit Court of Appeals of the Eighth Circuit characterized the right of an Indian long after his enrollment but before allotment as "a mere float—giving him no right to any specific property."

Second Proposition.

George Franklin Berryhill, as the father of Andrew J. Berryhill and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the State of Arkansas, an estate in fee simple in the lands in controversy.

This proposition is the natural sequence of the preceding one.

Section 6, of the Creek Supplemental Agreement, *supra,* places in force in the Indian Territory chapter 49 of Mansfield's Digest of the Statutes of Arkansas. Section 7 of the same act is the one in which the enrollment and allotment under consideration was made. Pursuant to this section, the land in controversy was allotted to the heirs of Andrew J. Berryhill, and the patent issued to said heirs. The patent recites that the allotment was made to the heirs, and the conveyance was made to the heirs without expressly naming them. It is submitted by the writer of this brief that the heirs, if more than one existed, would all take equally. The word "heirs" defines the grantees as a class; it is a description of person or persons who take under the patent; and if more than one, would take equally, regardless of the shares or proportions they would have taken had the title come to them by descent. This proposition is supported by

Auman v. *Auman,* 21 Pa. St. 348;
Ward v. *Stowe,* (N. C.) 27 Am. Dec. 239;

Brown v. *Belmarde,* 3 Kan. 40;
Gould v. *Tucker,* (S. D.) 105 N. W. 624;
Cooper v. *Wilder,* (Cal.) 43 Pac. Rep. 591;
Wittenbrook v. *Wheadon,* (Cal.) 60 Pac. Rep. 664.

In *Auman* v. *Auman, supra,* the Supreme Court of Pennsylvania said:

> "We do not perceive the distinction taken by counsel of the plaintiff in error between the phrase 'their heirs' and 'heirs of them.' The legal, as well as the grammatical meaning of both is the same. The one means children or issue no more than the other. In the case cited, the word heirs was necessarily a word of purchase because neither of the ancestors took a preceding estate. Being a word of purchase, it was by the same necessity *descriptio personae,* and no one could take who did not meet the description of a right heir to both ancestors."

Under the provision of section 6, above quoted, we must look to the Arkansas law to determine who can qualify as an heir to Andrew J. Berryhill, and section 1 of chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., section 2522), points out the general line of succession, and is as follows:

> (1) *Section 2522.* "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the pay-

ment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children or their descendants, then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts.

Third. If there be no children, or their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

By this section is established the general line of succession, and is a general table of descents. This section points out the heirs nearest in line in any given case. Andrew J. Berryhill left no child, nor the descendants of any child. Subdivision one, as above set forth, does not apply to the facts in this case. The second subdivision places the father next in line of succession, and under this subdivision George Franklin Berryhill takes title in fee to the land in controversy as heir of his son, under the patent to the heirs issued by the United States and the Creek Nation.

The leading case construing this section, by the Supreme Court of the State of Arkansas, is the case of *Kelly's Heirs* v. *McGuire,* reported in 15 Ark. 555, and the court in its opinion in that case says:

"The first section is general and comprehensive embracing all lands whether ancestral or *newly acquired,* subject to certain exceptions and qualifications hereinafter more particularly noticed, and these exceptions refer to real estate alone. * * *

"The effect of the first section, subject to exceptions and qualifications alluded to is to vest an absolute estate of inheritance to lands in the person who takes."

And in making its several conclusions the court further says:

"After carefully considering each of the provisions of the statute, and all together as a whole, we have come to the following conclusions:

6th. That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, all to be ascertained by the first section, which is to be considered as the general table of descent."

Keeping in mind that this is a case of title to heirs by purchase and not by descent, we assert that the persons standing nearest in the line of succession being once determined, the purpose of the reference to the statute is over; and the heir or heirs nearest in line take equally in their own right, regardless of the proportions they would have taken had the estate come to them by descent.

In the case of *Brown* v. *Belmarde*, 3 Kan. 40, the Supreme Court had before it a question similar to the one under consideration, and the court said:

> "The record shows that he (Lavonture, the member of the Indian tribe) did die in 1847. Therefore, from that time to the passage of the Act of May 26, 1860, the whole title to the lands in controversy was in the Government. That act operated as an original grant to the persons who shall be ascertained to be meant by the word 'heirs' used therein.
>
> "It was insisted in the argument that whoever would under the law have inherited the real estate generally of Lavonture at the time of his death, are the persons meant by the word 'heirs' in the Act of Congress. * * * But we know no rule of construction that would authorize such a conclusion.
>
> "Assuming, as above indicated that the act of Congress operated as an original grant, and that the word 'heirs of deceased reservees' are merely *descriptio personae*, the question is of comparatively easy solution."

In the case of *Ward* v. *Stowe, supra*, decided by the Supreme Court of North Carolina, the court had before it the construction of a will, the language of which is as follows:

> "It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nancy Stowe, the heirs of my sister, Sallie Ward, and my nephew, Levi Ward."

The court held in that case that the statute of descent must be looked to, to determine who should take as the heirs nearest in the line of succession. This once established, the purpose of the reference was over, and the persons thus ascertained take as tenants in common, the same as if they had been specially named in the will.

The Supreme Court of California, in two separate cases, construing two separate Acts of Congress, has announced and sustained the contention argued herein.

In *Cooper* v. *Wilder,* 43 Pac. 591, the court had before it the construction of the Act of Congress known as the "Timber Culture Act" (20 Stat. L. 113.) Under this act, the land in controversy was entered as a timber culture claim by one David Cooper in 1879. Cooper died in 1881, testate, but without completing a compliance with the provisions of the Act of Congress. By the will of David Cooper his widow was made the sole beneficiary. The property was distributed by the probate court to the widow. Subsequently, a patent to the lands was issued to the "Heirs of David Cooper, deceased." The plaintiff claimed as an heir of David Cooper. The court held that Cooper, at the time of his death, had not title to the land; that, therefore, he could not devise it; that the heirs took as purchasers directly from the United States; and that when the patent issued it inured directly from the United States in the heirs. It held further who the heirs

were must be determined by the law of California; but the personnel of the heirs being once determined they take in equal shares regardless of the share they would have taken had it been a title by descent. The court used the following language:

> "We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David Cooper, but they do not take by inheritance. The heirs will therefore take equally, regardless of the proportions in which they would have taken under the laws of succession of the state. The United States has no general law of succession. The heirs must, therefore, be found by the law of the state or territory in which the land is situated. By law of this state, the widow is an heir of the husband. The plaintiff and the widow would therefore take equally."

The controlling evidence in the Timber Culture Act and the one under consideration are similar. In both cases the conveyances were made to the heirs direct, and the heirs taking as purchasers, take without reference to the proportion they would have taken had it been a case of title by descent.

In the case of *Braun* v. *Mathieson*, 116 N. W. Rep. 789, the Supreme Court of Iowa had before it for construction the said Timber Culture Act, approved June 14, 1878. In that case, one Ludwig Braun entered the land in controversy, and died before receiving a patent to the land. That after, under the terms of the act, a patent was issued to the

"heirs of Ludwig Braun, deceased." And the court following the decision of the Supreme Court of California in the case of *Cooper* v. *Wilder, supra,* and the decision of this Honorable Court in *Hall* v. *Russell, supra,* said:

> "The statute provides that, if the person making such entry at the time when the right to a patent accrues is dead, the 'heirs of legal representatives' of the entryman may prove compliance with the provisions of the act, and accordingly the patent to the land in question was issued to the 'heirs of Ludwig Braun, deceased.' It has uniformly been held that such a patent under the timber culture act or other statutes containing similar provisions passes title directly to the heirs as substituted beneficiaries, who take by purchase, and not by descent, and that the title vests in such heirs by the grant, and not as successors to the interest of the deceased entryman. * * *
>
> "But the local law is resorted to, not for the purpose of determining the distribution of the estate of a deceased person, but only to determine who are the grantees under such description in the patent. When the persons coming within the description of 'heirs' are determined by the local law, their interests are fixed by the patent itself, and not by the law of descent and distribution.
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> "And this has been the construction placed upon the term 'heirs' by the Land Department of the United States under the timber culture statute. *King Timber Culture Entry,* 1 Land Dec. Int. 148; *Taylor Timber Culture Entry,* 1 Land Dec. Dep. Int. 163; *Rabuck* v. *Cass,* 5

Land Dec. Int. 398; *Starkweather* v. *Starkweather,* 15 Land Dec. Int. 162."

We submit that the principles announced by these cases are absolutely sound and are all decisive of the proposition under consideration.

While there is some conflict in the decisions where the testator makes a devise to his heirs, or to the heirs of a third person, there is, nevertheless, entire unanimity in the decisions construing a public grant to the heirs.

—*Walker* v. *Ehresman,* (Neb.) 113 N. W. Rep. 218;
Aspey v. *Barry,* (S. D.) 83 N. W. Rep. 91.

The section of the Act of Congress under which the lands in controversy were patented provided that the lands to which a deceased citizen would be entitled if living shall descend to and *be allotted* to his heirs. Under this section the United States and the Creek Nation had the power and authority to specifically name and designate the heirs and the grantees in each patent.

It cannot be said that George Franklin Berryhill was limited to a life estate in this property.

Section 10 of the said chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., Sec. 2531), is as follows:

"In cases where the intestate die without descendants, if the estate come by the father,

then it shall ascend to the father and his heirs; if by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then, descend. in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

As shown by the case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555, this section sets forth the exceptions to the general table of descents as shown by section 1 (M. D., Sec. 2522), and in determining the line of succession in any given case we must look first to section 1 as establishing the general line. Next to be examined, is the tenth section, to ascertain if our case comes within the exceptions of that section.

The very first inquiry in determining the application of this tenth section is the quantity and quality of the estate of which the intestate died seized. Actual seizin is absolutely necessary before this section is applicable. The next inquiry is the source of the decedent's title.

Now, examining the first section, we find that George Franklin Berryhill, the father, is the heir nearest in the line of succession, and that under that section he takes the fee, unless the case comes under the exceptions set forth in the tenth section. This latter section says, that if the estate came to the intestate from the father's line, it shall go back to the

father and his heirs; but if the estate be a new acquisition to the intestate, that is, an estate acquired by the intestate during his lifetime through his own industry, or by gift or devise from a stranger, it shall, on his death, go to his father for life, and in remainder to the intestate's collateral kindred. To say that, in the present case, the lands in controversy were a "new acquisition" to Andrew J. Berryhill, we submit, would be untrue; and equally so to say that the law applicable to "new acquisitions" should be considered applicable.

It is, nevertheless, urged by the plaintiff in error that the court should treat the present case as one of title by descent, and a new acquisition in the hands of Andrew J. Berryhill; that section 10 (M. D., Sec. 2531) should be looked to for the rule, and that that section should vest in the father, George Franklin Berryhill, but a life estate, with the remainder in fee to the paternal uncles and aunts, the grantors of the plaintiff in error; this, under the clause of said section, which sends the remainder "to the collateral kindred of the intestate in the manner provided in this act." We would ask, where in said chapter 49, are the collateral kindred nominated? It cannot be said that they are to be determined by the provisions of the next succeeding section (M. D., Sec. 2532), which are, that "in default of a father," the estate shall go, "first, to the brothers and sisters of the father;" next "to the brothers and sisters of the mother." Obviously, this

section is inapplicable. It is submitted that the words of section 10, "to the collateral kindred in the manner provided in this act," have reference solely and exclusively to the collateral kindred as pointed out in the first section of the chapter, which sets forth the general line of descent.

To vest a life estate in the father of Andrew J. Berryhill resort must be had to two separate fictions: *First,* it must be assumed that the estate came to the father by descent from his son, Andrew J. Berryhill; and, *second,* that the estate was a new acquisition in the hands of Andrew J. Berryhill.

We confidently assert that no fiction is necessary or warranted. The facts and the law are to be taken as they present themselves, and the all controlling fact is that Andrew J. Berryhill never had the least vestige of any right, title or interest, either legal or equitable, in the hands in controversy, nor in any other lands in the Creek Nation. The lands here are a new acquisition for the first time *in the hands of the heirs;* the heirs are the recipients of the Government's bounty; who the heirs are must be determined by an examination of said section 1 (M. D., Sec. 2522) of the Arkansas law of descent; and that section, pointing out the father as the first and nearest in line to the intestate, vests the title in him absolutely by purchase.

It cannot be said that the Arkansas law of descent not only nominates the heirs, but also defines

the quantity and duration of the estate to be taken by them. We submit that under the authorities heretofore cited, this contention would be wrong; but, admitting it, for the sake of argument, still George Franklin Berryhill, the father, would have taken the fee, and not a mere life estate. The one section of the whole chapter of the Arkansas law of descent which provides for the vesting of a life estate in either the father or mother, is said section 10 (M. D., 2531), and that only where the intestate dies *seized* of an estate which is a *new acquisition to him. The new acquisition here is to the heirs;* and, unless the court broadly assumes a different state of facts, section 1 (M. D., Sec. 2522), is the only section to be considered. Under that section, even it is determined that the word "heirs" defines not only the personnel of the grantees, but also the quantity of their estate, still the conclusion is irresistible that the father would take the whole estate in fee.

In conclusion, it is respectfully submitted that the devolution of the lands in controversy was in accordance with section 1 (M. D., 2522); that the estate was neither ancestral nor a new acquisition and that George Franklin Berryhill took the title in fee simple by direct grant from the United States and the Creek Nation.

Respectfully submitted,

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Amicus Curiae.